

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

MANAGEMENT & TRAINING
CORPORATION

Respondent

Case 01-CA-267261

and

IUE-CWA, THE INDUSTRIAL DIVISION OF
THE COMMUNICATIONS WORKERS OF AMERICA,
AFL-CIO

Charging Party

Jo Anne Howlett, Esq., for the General Counsel
Robert Fisher and Charles Guzak, Esqs. (Seyfarth Shaw LLP),
Boston, MA and Washington, DC, and *Martha Amundsen, Esq.*
(MTC), Centerville, UT, for the Respondent
Robert Holt, Esq. (IUE-CWA), Dayton, OH, for the Charging Party

DECISION

STATEMENT OF THE CASE

MICHAEL A. ROSAS, Administrative Law Judge. The hearing in this case was tried remotely via Zoom video-technology on April 6, 7 and 8, 2021. The complaint alleges that the Management & Training Corporation (the Respondent) violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act)¹¹ by unilaterally implementing practices during the COVID-19 pandemic, which exceeded those required by the Center for Disease Control (CDC), requiring employees to quarantine without first notifying the IUE-CWA, The Industrial Division of the Communications Workers of America, AFL-CIO (the Union), its employees exclusive collective bargaining representative, and offering the Union the opportunity to bargain over the decision or the effects of the decision. The Respondent contends that the change was mandated by law and, in any event, consistent with previously implemented policies relating to unpaid sick and personal leaves of absences. Moreover, the Respondent avers that the Union waived its objection to the unilateral changes, and in any event, the resulting charges were untimely filed.

¹¹ 42 U.S.C. §§ 142-159.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, operates a residential training centers for disadvantaged and at-risk youth at its facility in Chicopee, Massachusetts. At all relevant times during this controversy, the Respondent performed similar services valued in excess of \$50,000 in states other than Massachusetts. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Westover Job Corps Center*

The Westover Job Corps Center (Westover JCC) is a residential educational facility for at risk youth regulated and funded by the United States Department of Labor (DOL). The campus consists of a dormitory, dining facility, wellness department and academic building. Prior to March 2020,² the Westover JCC typically had over 100 residential students on campus.

Prior to September 1, 2018, DOL contracted with Alutiiq Training and Education, LLC (Alutiiq) to operate the facility. That contract ended on August 31, 2018 and, on September 1, 2018, Alternate Perspectives, Inc. (API) succeeded Alutiiq as the operator of the Westover JCC. API then subcontracted with the Respondent to operate of a portion of the facility.

The Westover JCC Center Director is Jennifer Hansen, an API employee. In operating their portion of the facility, the following employees of the Respondent report directly to Hansen: Clayton Connor, Director of Finance and Administration; Craig O'Brien, the CTS Manager, and Yvonne Craig, the OA Manger. Reporting to Connor, as admitted supervisor and/or agents under the Act, are Amanda Vazquez, a human resource specialist, and David Adamson, manager of the Maintenance Department. Connor also oversees the Wellness Manager, the Finance Department and the Finance Manager, Purchasing, and Food Servicing.

B. *The Collective-Bargaining Relationship*

Prior to September 1, 2018, Alutiiq recognized the Union as the exclusive collective-bargaining representative of its employees in the following unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act (the unit employees):

² All dates refer to 2020 unless otherwise stated.

All OA/CTS Assistants, Admissions Counselors, and CTS Specialists; Wellness Clerk, TEAP Specialists, Dental Assistants, Dental Hygienists and LPNs; Procurement Clerks and Property Clerk; Cooks and Cook's Helpers; Maintenance Technicians, Maintenance Workers, Custodians, and Groundskeepers, employed by the Employer at the Westover Job Corp Center in Chicopee, Massachusetts, and excluding all guards and supervisors as defined in the Act.

That recognition of the Union was originally embodied in a collective-bargaining agreement effective from March 1, 2017 to August 31, 2018 (the 2017 CBA). Upon assuming its portion of the Westover JCC's operation in 2018, the Respondent hired a workforce, the majority of whom had been Alutiiq employees and were exclusively represented by the Union.

After the transition of operations to API and the Respondent, the Union's membership at the Westover JCC split into separate workforces. Lance Green, an API career counselor at Westover and the Union's president, sought to enter into agreements on behalf of all the unit employees. After a lapse of nearly two years, the Union and API entered into their most recent agreement covering API employees for the period of July 1, 2020 to December 31, 2022. His efforts to land a contract with the Respondent, however, have been somewhat more elusive.

On August 10, 2018, three weeks prior to the transition, Green emailed API with a request to bargain on behalf of all the Alutiiq employees. He also requested copies of all company policies applicable to the bargaining unit employees after the changeover to API and the Respondent. On August 15, 2018, Martha Amundsen, replied on behalf of the Respondent. She informed Green that she would be handling all union and labor matters for the Respondent. After explaining that API and the Respondent were separate employers, Amundsen identified the positions that the Respondent would be staffing, as well as five positions that would be subcontracted – dental assistant, dentist, physician/nurse practitioner, dental hygienist, and mental health coordinator. Finally, she stated the request to bargain was premature, but identified 36 policies that would apply to newly hired employees. Amundsen also sent Green documents comprising employees' terms and conditions of employment, including the employee handbook and policies relating to rules of conduct, employee attendance, personal leave, and sick leave and vacation. The rest were sent to Green by August 31, 2018.

The Respondent hired its workforce by September 1, 2018. Most had been Alutiiq employees and members of the Union. In addition to setting the hourly wage and benefit rates, the letter set forth the remaining initial terms and conditions of employment. New hires were also required to agree to and acknowledge receipt of the employee handbook and other personnel materials, and the other policies and procedures provided to the Union.

On September 4, 2018, the Union requested that Respondent recognize it as the bargaining representative and bargain with the Union as the exclusive collective bargaining representative of the unit employees. The Respondent recognized the Union as the exclusive collective-bargaining representative of the unit employees pursuant to Section 9(a) of the Act and the parties commenced bargaining in October 2018. Negotiations were interrupted in November 2019 after the Respondent declared impasse and refused to meet for further bargaining. The Union filed charges in Case 01-CA-255530 on January 30 alleging the

Respondent's failure to meet and bargain on good faith. That case was settled, and formal bargaining resumed on June 4.

C. Relevant Policies and Procedures

1. Employee Handbook

(a) "Employment with the company is employment at-will. Employment at-will may be terminated, with or without cause and with or without notice, by the company or yourself. In addition, the company may make decisions regarding other terms of employment (including demotion, promotion, compensation, benefits and job duties), at any time, with or without cause or advanced notice. Nothing in this handbook, or any other document, including benefit plan descriptions, creates or is intended to create a promise or representation of continued employment by legally enforceable obligation on the part of the company." (p.3)

(b) Employee status classifications: full-time, part-time or on-call.

Full-time: "Employed to work a regularly scheduled 40-hour workweek;

Part-time: "Employed to work a regularly scheduled week of less than 40 hours; and

On-call: "Used to fill vacant shifts of full-time or part-time employees who are absent.

On-call employees may also be utilized for special purposes or emergencies. They are not guaranteed a specific number of hours or schedule. (p. 8.)

(c) Probationary periods: "All newly hired, on-call or temporary employees who reclassify to regular full-time or regular part-time status will be required to serve a probationary period of 180 days. The probationary period is intended for employees to assure they are still interested in and suited for the position they have accepted, and for the company to determine whether or not the employee should be retained[.]" (p. 8.)

(d) Employee Layoff: "Employees may be subject to a layoff as a result of changes in staffing requirements, work schedules or contractual commitments. When a layoff becomes necessary, seniority, performance and qualifications may be considered." (p. 10)

(e) Work hours: "The normal work schedule consists of a 40-hour workweek divided into five eight-hour days (exclusive of meal periods); however, staff coverage and facility needs may justify workweek variations as approved by the Regional Vice President. A minimum of two regularly scheduled days off are generally granted to you in a workweek. Your days off may be scheduled in accordance with work requirements. (p.11)

(f) Regular attendance and absence reporting: "Although the company provides some employees with sick leave, those days are not intended to be used as extra days off. In addition, authorized absences may be excused on an individual basis. The company may require a written explanation from your physician. A point may be reached where the overall attendance record of an employee significantly affects the efficiency of the department. In this case, management will take necessary counseling or disciplinary action, up to and including termination of employment." (p. 12)

(g) Vacation/Paid Time Off/Sick Leave: “MTC provides vacation/paid time off (PTO) during each calendar year to full and eligible part time employees. Some facilities may also provide sick leave. On-call employees may not be eligible for sick leave, and vacation/PTO. The amount of vacation/PTO will be determined by the length of continuous service. When terminating employment with MTC, any accrued and unused vacation/PTO balance may be included in the last paycheck. Sick leave will not be paid out at termination. MTC will comply with local, state and federal laws with regard to paid sick leave requirements.” (p. 13)

(h) Personal Leave:

“An unpaid personal leave of up to 30 days may be granted to you under special circumstances. Requests for leaves of absence will be considered individually along with the special circumstances related to the leave.

If you do not meet the FMLA eligibility requirements, the company may authorize a personal leave. The guidelines covering personal leave are as follows:

- Available sick leave and vacation/PTO may be required to be used prior to or during a personal leave.
- The company will endeavor to hold the position available for you if operations or requirements permit.
- If the position has been filled, consideration will be given to you, upon return, for the next available opening for which you qualify.
- If, after 30 days from the date the leave ended, a position is still not available, your employment will be terminated.

Once you’ve notified human resources of your need for leave, you will receive a Leave of Absence packet which will direct you to file a leave claim within two business days with MTC’s leave administrator.” (p. 14)

(i) Emergencies: “Fires, release of toxic fumes or chemicals, explosions, serious illnesses or injuries must be reported to your supervisor or security staff immediately.” (p. 25)

(j) Health and Safety: “ You are responsible for compliance with health and safety laws and regulations.” (p. 30)

2. Policy 205.15: Personal Leave

A. “Purpose: to establish policies and procedures for granting personal leaves of absences to employees.

B. Policy: Personal leave will be granted in extenuating circumstances and on a case by case basis. The following items will be considered by the company when determining whether to approve a personal leave: reason for the leave, tenure with the company,

performance, attendance record, business hardship and amount of leave time requested.

C. Procedure:

Personal leaves are normally allowed for a maximum of thirty (30) days.

(1) Eligibility – All employees are eligible, however, personal leaves are normally not granted during the first 180 days of employment.

(2) Employees are required to give thirty (30) days notice of the need to take a personal leave or if the leave is unforeseeable, as soon as possible.

(3) Medical personal leave – an employee may request a medical personal leave when they need leave for a medically related FMLA qualifying reason but do not qualify for FMLA, have exhausted their FMLA leave entitlement or, in the case of care of a family member, the family member does not meet the FMLA relationship requirement.

a) Requesting a medical personal leave the requesting employee must file a leave request within two (2) business days of receiving the Leave of Absence packet and complete and submit a Leave of Absence Request Form to human resources for authorization. The employee will be required to complete any subsequent documentation provided by MTC's leave administrator.

(4) Non-medical personal leave – an employee may request a non-medical personal leave when they need a leave but have exhausted or will exhaust all of their vacation or PTO.

a) Requesting a non-medical personal leave – the requesting employee must file a leave request with MTC's leave administrator within two (2) business days of receiving the Leave of Absence packet and complete and submit a Leave of Absence Request Form to human resources for authorization. The employee will also be required to complete any subsequent documentation provided by MTC's leave administrator. A non-medical personal leave must be authorized by the supervisor/manager, human resources and facility director prior to the employee taking time off related to the leave.

b) While on a non-medical personal leave - the employee is required to notify their supervisor, human resources and MTC's leave administrator of any changes to the frequency and duration of their leave.

c) Sick leave/Vacation/Paid Time Off (PTO) – the employee will be required to use any and all accrued vacation or PTO while on a non-medical personal leave. Sick leave may not be used for non-medical personal leaves.

(5) Group Insurance Coverage - An employee has the option to either continue or discontinue group insurance coverage during a personal leave of absence. An employee must contact MTC's third party benefits administrator to elect to discontinue coverage while on leave. If an employee has elected to discontinue group insurance during an approved personal leave, the employee is entitled to have their previously cancelled group insurance reinstated effective the first of the month following their return to work in an active benefit-eligible status."

3. Employee Furloughs (Policy 201.19): "Employees may be subject to a furlough as a result of changes in staffing requirements, work schedules, or contractual commitments. A furlough is the placing of an employee in a temporary, nonduty, non-pay status. Furloughs will be implemented in accordance with applicable law, regulations, and negotiated agreements." (pp. 3-5)

4. Policy 205.21: "Sick Leave and Vacation – Certain Locations

A. Purpose – To provide a policy on sick leave and vacation eligibility, and use for Job Corps employees in Massachusetts and Arizona.

B. Sick Leave: All Employees

(2) Paid Sick Leave Plan – The company recognizes there are times when illness, injury, medical emergency or medical appointments involving either the employee or members of the employee's immediate family may require absence from work.

In order to minimize the employee's loss of income during such absences, the company provides a paid sick leave plan. Employees are not vested in and will not be paid for unused paid sick leave.

(3) Types of Absences Qualifying for Paid Sick Leave

a. To care for an employee's own medical condition, or the employee's child, spouse, parent of a spouse, who is suffering from a physical or mental illness, injury, or medical condition that requires home care, professional medical diagnosis or care, or preventative medical care.

b. To attend a routine medical appointment or a routine medical appointment of the employee's own [sic], or for the employee's own, or for the employee's child, spouse, parent or parent of spouse, or to travel to and from an appointment, pharmacy, or other location related to the purpose for which the time was taken.

c. To address the psychological, physical or legal effects of domestic violence.

d. For business closures due to public health emergencies or absences occasioned by exposure to communicable disease.

- e. Approved Family Medical Leave and Medical Personal Leave – Leave for medical reasons, the birth or adoption of a child, for the care of a child, spouse or parent who has a serious health condition, or to care for or handle the affairs of a military service member. The employee does not need to reside with the family members to use paid sick leave or to care for the family member.
- f. For any other reason allowed by the paid sick leave law of the applicable state.

(5) Reporting Requirements An employee must report an absence and the fact that the absence is for sick leave purposes to their supervisor no later than one hour before the beginning of the employee’s scheduled shift. For unforeseeable use of sick leave, notice should be provided as soon as practicable. If the immediate supervisor is not available, the employee must notify the person designated in charge.”

D. The COVID-19 Pandemic’s Impact on the Respondent’s Operations

On March 6, the DOL issued Job Corps Information Notice No. 19-12 regarding the “Potential Coronavirus (COVID-19) Pandemic.” It advises JCCs, in pertinent part, to “encourage” employees who are ill to voluntarily isolate, stay home if they have a family member with symptoms, and work from home if possible. Throughout the document, the JCCs are advised to follow CDC and local public health guidelines.

On March 11, the 2019 novel Coronavirus (COVID-19) outbreak was characterized as a pandemic by the World Health Organization. On March 23, the Governor of Massachusetts responded by issuing Executive Order No. 13 (EO-13). The directive, which became effective on March 24 and was to remain in effect until April 7, required the closure of non-essential businesses to workers and the public, and the continuation of essential operations. EO-13 classified “residential/shelter facilities and services” as essential, as well as workers in the following categories: cafeteria operations in sheltered facilities, food service work in residential schools, facilities maintenance, communications and information technology. EO-13 was extended twice, and the restrictions remained until May 18.

As a result, all of Westover JCC’s students were sent home, with the exception of 13 students who remained in the dormitories because they had nowhere else to go. Resident advisors and dining hall staff also remained. The closure coincided with an extended spring break from March 16 to May 10. All staff remained employed, including those teleworking. On May 11, Westover JCC resumed instructional operations by transitioning to virtual operating status in accordance with DOL guidance and engaged students in distance learning.

E. The Union Requests Information on Covid Protocols

On March 5, Green requested the Respondent’s COVID-19 protocols and procedures. On March 10, Amundsen sent Green two documents. The first was the Respondent’s “Coronavirus Preparedness Plan – Guide for Job Corps Centers.” The second document was

DOL's March 6th Information Notice. On March 12, Green sent an email with more questions. Amundsen replied on March 13 (her response in italics):

5 How will payment of employees be handled in case of shutdown? *Although no shutdown is anticipated at this time should there be a change in staffing levels, it would be implemented in accordance with MTC Employee Furloughs Policy 201.19 (attached) and all applicable laws.*

10 How will payment of employees be handled in case of employees with positive tests? Confirmed exposure? Quarantined? *Employee compensation will be in accordance with current MTC policies previously provided. MTC does not have a separate COVID-19 compensation policy.*

15 What are the employer's protocols in place for employees that have to be absent due to school closing? A positive test result of child or family? Confirmed exposure of child or family? *Employee work attendance will be addressed in accordance with MTC policies previously provided. MTC does not have a separate COVID-19 attendance policy. The applicable MTC policies include, but are not limited to: Employee Handbook, attendance,*
 20 *vacation leave, sick leave, family medical leave, and personal leave. MTC is committed to considering the facts of each situation separately related to granting of personal leave as per MTC Policy 205.15 as previously provided.*

25 How will attendance absences/occurrences be handled as a result of any of the incidents in #1 and #3 above? *See my response to #3 above.*

On March 23, Green sent Amundsen an information request regarding the implications of EO-13 on unit employees: (Amundsen's response in italics):

30 Now that the State of Massachusetts is preparing for a statewide stay at home and requires non-essential business order. The local has concerns regarding MTC employees that will be negatively affected by this order.

- 35 1. Has the company identified non-essential staff *MTC is awaiting further DOL direction and is in the process determining essential and non-essential staff. That determination will be made in part based on whether there are students residing on center.*
2. Does the company intend to apply its policies or any other policies to these employees? *Yes. See my prior response to your last information request.*
- 40 3. Does the company intended to adjust their policies to support these MTC employees? *MTC has developed a temporary telework policy and agreement (see attached). It is yet to be determined whether temporary telework will be available to any bargaining unit members.*
4. Does the company intend to implement any other policies? *See above.*
- 45 5. Has the company been in contact with the national office regarding employee affect by state wide stay at home advisory, closing all non-essential businesses *MTC has been in communication with the DOL for all the centers the Company operates.*

6. Will employees be allowed to work from home if possible? *See above.*

On the same day, Hansen advised “All Westover Users” that the JCC was “classified as an essential business,” noting that they were considered a social service business and still had students that they needed to provide services to. The following day, March 24, Hansen reiterated that the Job Corp Center was considered an essential business and would be running with “essential staff.” She identified herself, managers, supervisors, directors, and employees in the following departments as essential: Human Resources, Finance, Food Service, Wellness, Maintenance, and Records. As a result, maintenance and other employees deemed essential received travel authorization letters signed by Hansen.

F. The Union Objects to Telework Changes

The aforementioned telework policy was distributed on March 20 for employees whose job duties could be performed from home during the pandemic. Eligible employees needed to request and have telework approved by their supervisor as well as management.

On March 26, the Union objected to the implementation of the telework policy or “any agreements or policy that have not been bargained with the Union. Local 81206 is the exclusive bargain agent for the members at Westover.” The Union also requested information relating to the telework policy. Later that day, Amundsen replied by expressing her surprise that bargaining unit employees had been offered telework arrangements and would accede to the Union’s demand by rescinding any such agreements:

I was unaware that API staff offered MTC bargaining unit employees a MTC company-wide telework agreement accompanied by a MTC company-wide policy. As per your demand below, MTC will rescind all MTC telework agreements and the MTC telework policy as applicable to MTC bargaining unit members at Westover. This rescission will occur on Monday, March 30, 2020, at 5:00 pm (EST). All MTC bargaining unit members at Westover will be put on notice of this rescission. As soon as the rescission is made and in accordance with the NLRA, the status quo MTC policies will apply as per my prior response to your information request. Those status quo policies include, but are not limited to: Sick Leave and Vacation, Holidays, Family Medical Leave, Personal Leave, Nonexempt Employee Layoffs, Separation of Employment, Employee Furloughs, Benefits Eligibility, COBRA, and the MTC Employee Handbook. Those policies were provided to you and the Union several times starting on August 15, 2018, prior to the Union being recognized.

At this unprecedented time with COVID-19, the situation is changing day-by-day and even hour-by-hour. We at MTC have been working tirelessly to protect our staff and students. Navigating these turbulent times with different federal, state, and local orders across the nation, and awaiting DOL guidance required a comprehensive and cohesive MTC company-wide approach. In an effort to streamline this approach and best protect MTC employees, MTC created a company-wide telework policy and agreement.

As you know almost all Job Corps students were abruptly sent home. There are only approximately 17 students remaining on Center as they have special housing needs. As you also know, accordingly, MTC's current staffing needs have been greatly reduced as the Center students were sent home. In creating this policy and agreement, MTC on a company-wide basis was seeking an accommodation for all MTC employees across the nation in accordance with DOL approval; federal, state, and local orders; and the current status quo of MTC policies. MTC's goal is to keep all employees safe, and to the extent possible, working and receiving their regular pay and benefits.

As per your request, I have enclosed the MTC telework policy and agreement. I have also enclosed MTC COVID-19 FAQs, and MTC COVID-19 Benefit FAQs. If after reviewing the enclosed documents you change your mind and do not want MTC to rescind the MTC telework policy and agreement, please let me know in writing prior to 5:00pm on Monday, March 30, 2020. Again, if MTC is going to allow any telework, anywhere across the country, MTC has a need to have a comprehensive and cohesive policy which has been provided. If you change your mind and withdraw your demand, then this is MTC's best offer first, MTC's only offer, and time is of the essence so MTC may properly and promptly address each employee's situation in accordance with the status quo MTC policies.

The attached document containing the COVID-19 FAQs referenced by Amundsen was dated March 22 and stated, in pertinent part:

7. I was around someone that in the last 14 days who test positive for COVID-19. What should I do?

You should stay home and contact your doctor. You can return to work after either (a) 14 days from the date you last came into contact with the person; or (b) after a negative test result is obtained and at least 24 hours after showing any symptoms of COVID-19. Symptoms for this purpose mean (a) a fever greater than 100.4, (b) signs of a fever, and (c) any other symptoms, without the aid of fever-reducing medicines (e.g. anything containing ibuprofen or acetaminophen) or other symptom-masking medicines (e.g. cough suppressants).

8. I have a household member (spouse, child, live-in parent, etc.) who has COVID-19 symptoms (fever greater than 100.4, dry cough, etc.) but has not had a test. Can I come to work?

No. You should stay home and contact your doctor.

11. If I am sent home for exhibiting symptoms when can I return to work?

The CDC has indicated that in non-healthcare settings where individuals in the workplace are not at a greater risk of contracting COVID-19, employees may return to

work at least 24 hours after no longer having or exhibiting (a) a fever greater than 100.4, (b) signs of a fever, and (c) any other symptoms, without the aid of fever reducing medicines (e.g., anything containing ibuprofen or acetaminophen) or other symptom-masking medicines (e.g., cough suppressants). The return-to-work standards and time periods may be different for an individual with a confirmed COVID- 19 diagnosis. MTC will consult the CDC's and other public health authorities' guidance.

On March 30, Holt replied that the Union did not want the Respondent to rescind the telework policy. However, the Union requested “to bargain improvements to this policy as soon as you are available.” Amundsen replied less than an hour later:³

As you know, we are in an emergency situation like no other in our lifetime, and time is of the essence as we need to know how to code employees' time now: Whether to have an employee use paid time off, put on leave without pay, or to layoff as the case may be and as the situation changes with time. We at MTC have been working tirelessly day, night, and weekends to keep our employees and students safe as we navigate this ever changing situation.

As I stated in my letter, the policy and agreement MTC has for all other employees nationwide is our best offer first, and only offer to the Union. The Company has drafted these documents and made this offer considering various compliance issues, and to streamline the process nationwide. Efficiency, safety, and compliance with all laws and orders using one policy and one agreement nationwide is of utmost importance and necessary at this time for MTC to implement any telework agreement at all.

As you understand black letter contract law, because you are not accepting MTC's offer as given, it is deemed a rejection by the Union. When the Union says in essence, "I accept but I want to make changes," as you know that is a rejection and a counteroffer. MTC rejects your counter offer. I will again extend MTC's best offer first, until 5:00pm EST. If the offer is not accepted as given, MTC will grant the Union's demand and rescind the telework policy and agreement as it applies to bargaining unit members. This MTC telework policy and agreement will remain in place for all non-bargaining unit members.

A few minutes later, Holt replied emphatically: “I want to be clear. The Union withdraws its demand to rescind MTC’s telework policy. Please confirm that you understand this.” Not satisfied with Holt’s position, Amundsen insisted that he acknowledge the lawfulness of the Respondent’s unilateral implementation of the telework policy:

It was the Union's position that MTC made a unilateral change when API staff offered this option to MTC bargaining unit employees. You cannot un-ring that bell of a threat. A threat that MTC violated the law. As such, MTC is withdrawing that action at 5:00pm EST that the Union deemed a unilateral change in its initial demand for rescission regardless of whether the Union says it withdraws that demand for rescission. The threat of a ULP is still there. As you know, the statute of limitations for a ULP is six months

³ The seemingly out-of-order time sequences listed in this email

and in some cases possibly longer. The bargaining unit members have no right to telework. The status quo is no telework. Based on the emergency, safety, efficiency, and compliance issues listed below MTC has made its best offer first, and only offer. Unless you accept the offer as given by 5:00pm EST today, I am informing you that MTC will rescind that change regardless of the Union's withdrawal of their demand. Yes or no? Do you accept MTC's best offer first, and only offer, to expire at 5:00pm EST today?

Holt replied a short while later: "In answer to your 'yes or no' question, yes, on behalf of the Union I accept MTC's offer. Amundsen acknowledged the Union's acceptance a few minutes later.

G. Additional Classifications as Essential

On April 1, Hansen emailed all Westover JCC staff with updated information concerning the essential status of certain employees. In addition to notifying staff that the school break would be extended an additional two weeks, it stated, in pertinent part:

There will be a new travel letter coming out from the Federal Government. For lack of better words - This is due to needing a little more authority (the federal government) behind the letter due to some states/town/counties enforcing stricter stay home policies. The new letter will require more information including your driver's license number. We have most of your information on file in HR. However, If anyone has a concern with us putting this information onto the letter please let us know by noon tomorrow (Thursday). Unlike before, only people designated as essential staff will receive these letters. We have to submit a list to the regional office of specific people who are considered essential with a justification of why they are essential by Thursday in order to get permission to use these letters.

By April 7, maintenance department employees were all designated as "essential staff" and were issued these letters.

To whom it may concern. Westover Job Corps provides goods and services under a contract to the United States Department of Labor. The Federal government continues to operate during the COVID-19 public health emergency.

The individual(s) listed below is/are employed by Westover Job Corps and is/are authorized to travel and to commute as necessary to perform Federal contract work the United States Department of Labor has deemed essential, mission critical work. Please permit the following individual(s) to travel or commute to and from 103 Johnson Road Chicopee, MA 01022 during regular business hours in connection with the performance of that Federal contract work:

H. Massachusetts' Revised State COVID-19 Guidance

At all relevant times, Massachusetts and the DOL provided guidance on the operation of the Westover JCC. On May 18, Massachusetts issued guidance for the phased reopening of non-essential businesses. Notably, essential businesses were to stay open, but were required to comply with safety standards and self-certify by May 25. Guidance relating to applicable safety

standards was previously provided on May 7. On that date, Massachusetts revised its Occupational Exposure & Return to Work Guidance for non-healthcare workers based on guidance by the CDC (the May 7th Guidance). It noted that, as of May 4, the CDC did not recommend that healthcare workers, first responders and essential workers “self-quarantine after an exposure if they are not experiencing symptoms.” However, the CDC did recommend that such individuals wear appropriate protective equipment and self-monitor for symptoms. It further recommended that all other workers “exposed to someone with COVID-19 but [without] symptoms” quarantine for 14 days if “exposed to someone with COVID-19 but you don’t have symptoms” and “isolate when [y]ou have tested positive for COVID-19 or you have symptoms of COVID-19.” Quarantine and isolation were defined as follows:

Quarantine is for individuals who may have been exposed to someone who is COVID-19 positive but are not exhibiting any symptoms and have not tested positive. Individuals who are in quarantine should stay in place for 14 days.

Isolation is for individuals who have either tested positive for COVID-19 or who are exhibiting symptoms of COVID-19 (including fever, chills, shaking chills, muscle pain, headache, sore throat, or new loss of taste or smell) and have been told by a provider that they have, or probably have, COVID-19, even in the absence of a test.

The May 7th Guidance also provided additional guidance applicable to all workers sickened or exposed to the virus:

All Workers: Interim Guidance for Businesses and Employers to Plan and Respond to Coronavirus Disease 2019 (COVID-19)

- Employees who have symptoms (as listed above) should notify their supervisor and stay home.
- Sick employees should follow CDC-recommended steps. Employees should not return to work until the criteria to discontinue home isolation are met, in consultation with healthcare providers and state and local health departments.
- Employees who are well but who have a sick family member at home with COVID-19 should notify their supervisor and follow CDC recommended precautions.
- Employees who appear to have symptoms (as listed above) upon arrival at work or who become sick during the day should immediately be separated from other employees, customers, and visitors and sent home.
- If an employee is confirmed to have COVID-19 infection, employers should inform fellow employees of their possible exposure to COVID-19 in the workplace but maintain confidentiality as required by the Americans with Disabilities Act (ADA). The employer should instruct fellow employees about how to proceed based on the CDC Public Health Recommendations for Community-Related Exposure.

*Ending Isolation/Return to Work Guidance*For Persons with COVID-19 Under Isolation

1. Symptom-based strategy

Persons with COVID-19 who have symptoms and were directed to care for themselves at home may discontinue isolation under the following conditions:

- At least 3 days (72 hours) have passed *since recovery* defined as resolution of fever without the use of fever-reducing medications and improvement in respiratory symptoms (e.g., cough, shortness of breath); and,

- At least 10 days have passed *since symptoms first appeared*.

2. Test-based strategy: A test-based strategy is contingent on the availability of ample testing supplies and laboratory capacity as well as convenient access to testing. . . .

Essential Workers: Implementing Safety Practices for Critical Infrastructure Workers Who May Have Had Exposure to a Person with Suspected or Confirmed COVID-19

To ensure continuity of operations of essential functions, CDC advises that critical infrastructure workers may be permitted to continue work following potential exposure to COVID-19, provided they remain asymptomatic and additional precautions are implemented to protect them and the community. A potential exposure means being a household contact or having close contact within 6 feet of an individual with confirmed or suspected COVID-19 for at least 15 minutes OR being sneezed or coughed on by the individual. The timeframe for having contact with an individual includes the period of time of 48 hours before the individual became symptomatic.

Critical Infrastructure workers who have had an exposure but remain asymptomatic should adhere to the following practices prior to and during their work shift:

- **Pre-Screen:** Employers should measure the employee's temperature and assess symptoms prior to them starting work. Ideally, temperature checks should happen before the individual enters the facility. A non-contact thermometer should be used or thermometers must be disinfected between uses.
- **Regular Monitoring:** As long as the employee doesn't have a temperature >100.0 F or symptoms, they should self-monitor under the supervision of their employer's occupational health program.
- **Wear a Mask:** The employee should wear a facemask at all times while in the workplace for 14 days after last exposure. Employers can issue facemasks or can approve employees' supplied cloth face coverings in the event of shortages.

- Wash Hands: The employee should wash their hand frequently throughout the day; alcohol-based hand sanitizers with at least 60% alcohol may be used when handwashing facilities are not available.
- 5 • Social Distance: The employee should maintain 6 feet and practice social distancing as work duties permit in the workplace.
- Disinfect and Clean work spaces: Clean and disinfect all areas such as offices, bathrooms, common areas, shared electronic equipment frequently.

10 If the employee becomes sick during the day, they should be sent home immediately. Surfaces in their workspace should be cleaned and disinfected. Information on persons who had contact with the ill employee during the time the employee had symptoms and 2 days prior to symptoms should be compiled. Others at the facility with close contact
15 within 6 feet of the employee for at least 10-15 minutes during this time would be considered exposed.

On September 25, the DOL issued JCC Information Notice 20-08. It required the Westover JCC to submit a plan for resuming physical operations within one week and included a
20 checklist of operational requirements for the resumption of physical operations. The checklist required staff who test positive or have symptoms to stay home. It instructed centers to follow CDC guidelines for determining when an employee could return, and specifically told them to use the symptom-based strategy. On October 2, API submitted to the DOL its plan for resuming onsite operations at the Center. The plan explained that staff who are sick must stay home and
25 contact the Center if they have COVID-19 symptoms, tested positive for the disease or have been in close contact with someone who tested positive. The plan also explained that “[q]uarantine will be used” for individuals who were in close contact with someone who tested positive.

On November 3, the DOL issued JCC Information Notice 20-11 providing a “COVID-19
30 Symptom Tracker and Attestation and Emotional Wellness Checklist.” It required JCC employees to complete the checklist every day when at the Westover JCC and, if they had COVID-19 symptoms or had been in close contact with someone with COVID-19, to remain at home and contact their supervisor and their personal health care provider to evaluate the need for COVID-19 testing. On December 1, Hanson notified all Westover JCC staff that DOL approved
35 API’s plan for the resumption of physical instruction for the nine students still on campus. She attached API’s “approved resumption plan as a friendly reminder that we need to follow the protocols in the plan to ensure that we are all staying safe.”

40 *I. The Respondent’s Revisions to Terms and Conditions of Employment*

On July 6, API issued a handbook addendum containing language about what should happen if a staff member had COVID-19 symptoms, tested positive for COVID-19 or was in close contact with someone who tested positive:

45 To ensure safety at API operated Job Corps centers, the following describes changes and expectations to new center NORMAL. Every staff member working on Westover Job Corps center must agree to the following to ensure they protect their own safety and

the safety of others at the center. This document serves as a part of the COVID-19 training. Review the following expectations/requirements and sign this document. Your signature acknowledges that you are aware of and agree to the center's expectations and have received this document. Should you have any questions or concerns regarding this document, please direct them to Human Resources.

Staff members will not report to work if they are displaying any COVID-19 symptoms or have had recent exposure to someone who had tested or tests positive for COVID-19. They will contact their supervisor for instructions. Any staff member who arrives on center with a fever or COVID-19 symptoms will not be allowed on center. . . .⁴

On July 9, the Respondent distributed a similar memorandum, dated July 8, to unit employees entitled "MTC Staff Training for Return to Work Under Covid-19 Precautions" (the July 8th Memorandum):

To ensure safety at MTC operated Job Corps centers, the following describes changes and expectations to the new center NORMAL. Every MTC staff member working on Westover Job Corps center must agree to the following and ensure they protect their own safety and the safety of others at the center. This document serves as a part of the Covid-19 training. Review the following expectations/requirements and sign this document. Your signature acknowledges that you are aware and agree to the center's expectations and have received this document.

- Staff members will not report to work if they are displaying any COVID-19 symptoms or recent exposure to someone who tests positive for COVID-19. They will contact their supervisor for instructions. Any staff member who arrives on center with a fever or COVID-19 symptoms will not be allowed on center.
- All staff are required to follow OSHA, CDC, and local jurisdiction procedures while at the center. The requirements are as follows: Inform your supervisor if you are sick or have a family member who is at home with COVID-19, wash your hands for at least 20 seconds or use hand sanitizer with at least 60% alcohol before and after work shifts, before and after work breaks, after blowing your nose, coughing, or sneezing, after using the restroom, before eating or preparing food, after putting on, touching, or removing cloth face coverings. Avoid touching eyes, nose, and mouth with unwashed hands. Cover mouth and nose with a tissue when you cough or sneeze, or use the inside of your elbow. Throw used tissues into no-touch trash cans and immediately wash hands with soap and water for at least 20 seconds. If soap and water are not available, use hand sanitizer containing at least 60% alcohol.
- Practice routine cleaning and disinfection of frequently touched objects and surfaces such as workstations, keyboards, telephones, handrails, and doorknobs. Dirty surfaces can be cleaned with soap and water prior to disinfection. To disinfect, use products that meet EPA's criteria for use against SARS-CoV-2^{external icon}, the cause of COVID-19, and are appropriate for the surface.
- Avoid using other employees' phones, desks, offices, or other work tools and

⁴ There is no assertion that API's employee handbook, which API and the Union bargain over, applied to the Respondent's employees. (R. Exh. 105(a).)

equipment, when possible. Clean and disinfect them before and after use.

- Practice social distancing by avoiding large gatherings and maintaining distance (at least 6 feet) from others when possible.
- All staff working at the center will complete an initial and any on-going training/briefings that update center changes to any safety procedures.
- All staff will complete the required health questionnaire that reviews exposure/risks related to Covid-19.
- Upon return of students to the center, all staff are expected to ensure students and other staff comply with center safety procedures and social distancing. All staff are expected to respectfully approach and intervene with students and other staff who are not complying with center procedures/practices.
- All staff must wear a cloth mask, which the center will provide, whenever they cannot maintain at least six (6) feet social distancing. If local regulations are more restrictive than CDC recommendations, staff are to comply with local jurisdiction requirements.
- Dorm, classroom, and cafeteria capacity will be reduced to allow for proper social distancing. Staff will have to prepare these areas for distancing practices and ensure safety practices are followed.
- Students will not be permitted to leave campus for recreational activities, weekend passes, etc. Therefore, all staff are expected to assist with on-center student recreational and other activities.
- To maintain a clean and safe center, all staff will be required to assist with daily cleaning and proper storage of cleaning supplies.
- Temperature checks will be done for all staff as they enter the center each day and staff will be expected to follow CDC and OSHA guidelines.

I have read the above expectations and agree to follow all the expectations. I understand this is for safety reasons and will help reduce the risk of spreading COVID-19.

Staff Name

Date

On July 9, Vazquez emailed the July 8th Memorandum to bargaining unit employees, supervisors and managers requiring employees, as a condition of returning to work, to sign and return it to her by the end of the day. The Union was not copied on the email or notified about it before it went out.

To effectuate its new COVID-related leave policies, the Respondent generated a new “PERSONAL NON-MEDICAL LEAVE” form: “COVID-19 Related Only Leave of Absence Request Form – SCA Employees.”⁵ If an employee reported a potential exposure to a COVID-19 positive individual, he/she was required to take accrued vacation or sick leave for the time off during the required quarantine period. After instructing employees to send the form to human resources, it noted that the form was not for leave requests “due to your own or a family member’s actual illness.” Employees were then required to select “only one” of the following reasons for the leave request:

⁵ Although dated May 1, there is no evidence that the form was distributed prior to July 9.

- Quarantine Imposed by Government Agency or Public Health Department
- Quarantine Imposed by Employer
- Quarantine Due to Exposure to Positive COVID-19 Case or under health care provider's directive due to possible exposure
- Daycare/School Closure
- Voluntary Home Stay – Employee or Family Member in Same Household is in High Risk Category
- Concerned for Safety

Attached to the new non-medical leave form was a certification to be signed by employees acknowledging the following conditions:

1. The information on this form is true and correct. I understand that falsifying information on this form may lead to disciplinary action, up to and including termination of employment with Management & Training Corporation.
2. I understand that if I am on a leave of absence and my leave is not FMLA or state protected, I am responsible for paying the insurance premiums to keep my company-provided insurance active. I understand that insurance premiums are due by the date listed on the billing notice and failure to pay premiums in a timely manner may result in my insurance being cancelled.
3. I understand that if I am on a leave of absence any premiums for optional or voluntary coverage must be remitted by the date listed on the billing notice and failure to pay premiums in a timely manner may result in my insurance being cancelled.
4. I understand while on a leave of absence, my next annual vested PTO allotment will be prorated as my leave is not considered hours worked for the calculation of PTO, nor will I be paid for holidays, educational assistance, bereavement, or jury duty.
5. I understand that failure to return to work on or before the expiration date of the leave may be considered voluntary resignation, unless advance arrangements for an extension have been made, within the appropriate timeframe and approved in writing.
6. I understand that I am expected to return calls and emails and to check in with my HR manager on a weekly basis while on leave.
7. I understand I may be disciplined, up to and including the possibility of termination, if I fail to communicate and/or provide information about my continued leave status.

J. Union Objections to the New COVID-19 Policies

The parties continued bargaining virtually during the summer. On July 21, Holt expressed the Union's objection to the Respondent's "unilaterally implemented changes to the terms and conditions of employment for bargaining unit employees related to COVID-19" in the July 8th Memorandum. He acknowledged the serious health and safety threat posed by the

pandemic but demanded the Respondent bargain over those changes. In order to prepare the Union's bargaining proposals, Holt requested detailed information relating to (1) the Respondent's COVID-19 preparedness plan and related documents for the health and safety of employees; (2) actions to be taken by the Respondent to comply with state or local health authorities; (3) employee statistics detailing COVID-19 positive test results and reported symptoms, exposures and identified risk factors; (4) work areas where it would not be possible for employees to maintain minimum a six-foot distance from co-workers, students or other individuals; and (5) any increased workplace responsibilities assigned to unit employees due to COVID-19.

On July 27, following a week when the parties met virtually to bargain an initial contract, Amundsen sent a large amount of information in response to Holt's request for information and demand to bargain. The information included API's July 15 plan for resuming student operations at the Westover JCC, which API prepared and submitted to the DOL. API's plan explained that all staff were required to attest that they are symptom free at a checkpoint before entering the facility and that employees with symptoms are not permitted entry. Further, the plan also stated that staff who have symptoms, have tested positive for COVID-19 or have been in close contact with someone who tested positive for the disease must stay home. She stated that the information she provided in March was sufficient to put the Union on notice of the changes the Respondent was implementing in response to EO-33, which issued on May 18. She also repeated her contention that all changes were consistent with the initially implemented terms, implying that they did not need to be bargained. Amundson asserted that there were no new or different policies applicable to Respondent's employees, with the exception of a "temporary telework policy." No other new policies in response to COVID were acknowledged.

On August 5, Amundsen emailed Green an updated COVID-19 FAQ for employees. Pertinent provisions include the following:

10. If I am sent home for exhibiting symptoms when can I return to work?

MTC will follow the direction of its customers with respect to keeping employees away from the workplace. Generally speaking, employees may return to work after at least 24 hours have passed since recovery defined as resolution of fever without the use of fever-reducing medications and improvement in COVID-19 symptoms (e.g., cough, shortness of breath, sore throat, etc.), and at least 10 days have passed since symptoms first appeared.

The return-to-work standards and time periods may be different for an individual with a confirmed COVID-19 diagnosis. Employers should consult their human resources manager, the CDC's and other public health authorities' guidance.

13. If I am told to stay at home based on a state or local government order, can I take an unpaid leave of absence and save my paid time off for a later date?

No. You must use your available sick leave, vacation, or paid time off, as permitted by law.

15. What if my state or local officials have issued a shelter-in-place order?

All of the currently issued shelter-in-place orders contain exceptions for essential businesses and essential workers. . . .

5 Whether our Job Corps Centers constitute an essential business under a shelter-in-place order depends on the specific terms of the order and whether students remain on center.

10 Residential: Where students continue to reside on center, the Job Corps Center likely qualifies as an essential business providing food, shelter and other services to economically disadvantaged persons.

15 Non-Residential: Where the Job Corps Center is a nonresidential center or there are no students remaining on center, the Job Corps Center may not qualify as an essential business, but some of its employees (security, maintenance, payroll, human resources and benefits, IT etc.) likely qualify as essential workers to the extent they are unable to perform their job duties from home.

20 If a shelter-in-place order has been issued for your state, your Center Director will let you know whether your center is an essential business and whether you have been deemed an essential worker who is allowed and expected to continue to report to work on center.

25 The parties met virtually throughout the spring and summer. On August 10, the Union proposed that unit employees “required to . . . quarantine due to established workplace COVID-19 protocols . . . be paid for the time without using accruals.” Other COVID-related proposals included cleaning procedures, responsibilities and supplies, personal protective equipment, hazard pay, and expanded telework opportunities. Amundsen rejected the proposal on the ground that “employees are safer on Center than they are off-Center and out in the community due to all the Center protocols that have been provided to the Union.” She did, however, provide counterproposals. With respect to the accrual issue, she stated:

30 Please see the revised employee FAQs sent the Local Union President, Lance Green, on August 5, 2020. See attached. MTC provides paid sick leave, paid vacation, and personal unpaid leave of absences in some circumstances. Additionally, in [Massachusetts], employees can collect workers comp benefits if “the hazard of contracting such diseases by an employee is inherent in the employment,” as specified in [Massachusetts General Law] c.152 §1(7A). Otherwise, unemployment benefits may apply depending on the circumstances.)

40 On August 11, the Union reiterated its proposal relating to the use of accruals in mandated quarantine situations. Again, Amundsen rejected that proposal, and in pertinent part, counter proposed that it “shall follow all policies and protocols previously sent to the Union and as required by API, and all government laws and regulations.”

45 On August 14, the parties again exchanged proposals. The bargaining notes reflect Amundsen’s further explanation for its continued and complete rejection of any proposal concerning COVID or the effects of potential quarantine directives for employees who were exposed but not sick. She elaborated that the Union was proposing that the Respondent “provide

hazard pay when the real hazard is how employees conduct themselves off center. . . . What the Union is also proposing is that the Union provide employees 10 days of paid leave if employees expos[e] themselves to COVID while away from work. MTC rejects this. MTC provides paid sick leave, paid vacation, and personal unpaid leave of absences in some circumstances.”

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On September 29, the Union proposed that all bargaining employees be given 80 hours of additional paid leave per year, which could be used if they were required to quarantine. This was also rejected. As of the hearing, the parties had yet to reach agreement on an initial contract.

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K. Unit Employees Impacted by the New COVID Leave Policies

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Prior to July, Vasquez processed one non-medical personal leave of absence request unrelated to COVID-19. That instance was referred to Vasquez by a supervisor who had been approached by an employee who requested a leave of absence.⁶ Throughout the pandemic, the Respondent has been fully funded and staffed. During the closure of most of the Westover JCC and its operational transition to virtual and remote learning, there were no layoffs, furloughs or diminution of employees’ compensated work hours.

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Beginning in July, upon arriving at the Westover JCC’s checkpoints, unit employees were asked about COVID-19 related symptoms and had their temperatures taken.⁷ Vasquez was responsible for investigating possible COVID-19 exposures and otherwise implementing the Respondent’s COVID-19 mitigation policies and practices.⁸ When Vasquez learned of a report that an employee may have been exposed to someone who tested positive, she spoke to the employee over the telephone and asked the employee a series of CDC-recommended questions to determine whether the individual had been in close contact, i.e., within six feet of someone who tested positive for COVID-19 for at least 15 minutes. If she determined through the interview process that the employee was determined to be within six feet of an individual who tested positive for COVID-19 for more than fifteen minutes, that employee would need to quarantine for fourteen days. If an employee reported having symptoms, they would be instructed not to come to work if they were feeling sick, and if those symptoms were consistent with COVID-19, they would need to quarantine for a period of at least 10 days until they were no longer showing symptoms. Vasquez consistently applied this process of interviewing employees about their symptoms, exposure, or positive test to determine whether they would need to quarantine, and she then advised them accordingly. This quarantine process was still being followed by the Respondent through February 2021.⁹

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After conducting the interview process, if Vasquez determined that an employee needed to quarantine, she would complete the form for the employee. The form has a section entitled “Type of Leave,” wherein employees are to select a reason for their leave. In relevant part, the listed types include “quarantine imposed by government agency or public health department,” “quarantine imposed by employer,” and “quarantine due to exposure to positive COVID-19 case

⁶ Vasquez was a very credible witness.

⁷ R. Exh. 28.

⁸ GC Exh. 20, 23, 24, 26, 27, 28.

⁹ GC Exh. 19, 27; R. Exh. 104.

or under health care provider's directive due to possible exposure." Vazquez would recommend a box for the employee to select and that is what usually checked off.

(1) Tyler Ciekko

On October 8, Ciekko, a facilities maintenance technician, went to work even though he did not feel well. He answered the standard COVID-19 questions at the security checkpoint but did not reveal his symptoms. At work, he told his supervisor, Adamson, that he did not feel well. Adamson told him to report it to Vazquez. She told him to get a COVID-19 test and he left to get the test. It took several days for Ciekko to get tested. On October 8, Adamson asked for an update. On October 12, Ciekko informed Adamson that he was still waiting for the results. Adamson replied by wishing him well and to call Vazquez "ASAP." Ciekko replied that he called Vazquez and left a message. On October 13, Ciekko texted Adamson that the results came back negative, and he would return to work the next day. During the quarantine period, Ciekko used accrued sick time and vacation time.¹⁰

On November 8, Ciekko was notified that he might have been exposed to a photographer who tested positive for COVID-19. He took two sick or personal days off while he got tested and received the results. On November 10, Ciekko informed Adamson, about the possible exposure and that he was awaiting the results. When he learned that the results were negative the next day, he informed Adamson. Vazquez contacted him shortly thereafter. She told him that he could not return to work and needed to quarantine for 14 days because he could still be infected. She also told him that he needed to exhaust his sick time and personal time, and then apply for unemployment compensation. As he did not have enough leave to cover this period, Vazquez further advised him that he needed to fill out the forms requesting a non-medical personal leave of absence. She completed it with him by telephone. Ciekko intended to select the form category for "Quarantine imposed by Employer," but Vazquez advised him to select the category for Quarantine Due to Exposure to Positive COVID-19." Vazquez documented the terms of Ciekko's leave of absence in a November 12 email:

You requested a Personal Non-Medical Leave (PNMLOA) COVID-19 related on 11/12/2020. Your leave request has been approved for the period of 11/9/2020 - 11/23/2020.

While on a COVID-19 related PNM LOA, you are expected to contact your human resources department on a weekly basis and provide the status of your leave expected return to work date. In addition, you are required to be available in the event human resources needs to contact you for any reason. It is also your responsibility to return on your expected return date unless prior arrangements have been made directly with your human resources specialist.

It is vital that human resources has your updated contact information (cell/home telephone number, mailing address and email address) on file and that you promptly

¹⁰ This finding is based on Adamson's credible testimony that he did not tell Ciekko to go home, but rather, notify human resources. (Tr. 390-93.) Ciekko initially testified that Adamson told him to go home, but it became clear on cross-examination that he did not recall the particulars of the conversation. (Tr. 233-36, 390-93.)

respond to any Inquiries from your human resources department. If you do not have voice mail set up on your cell and/or home telephone number then It is important that you take the necessary steps in order to do so right away. It is also very important that you promptly read and respond to any human resources email or written Inquiries while on leave.

Please contact human resources to verify and confirm your current contact Information so that we can ensure our records are up-to-date. Failure to provide updated contact information does not excuse you from your responsibilities while on leave. You may be subject to disciplinary action, up to and including the possibility of termination, In the event human resources is unable to contact you while on leave or should you fail to maintain regular contact with your human resources department.

Unless prior arrangements have been made with your human resources department, *failure to return to work on your expected return date may also result In disciplinary action, up to and Including the possibility of termination.*

Please promptly contact your human resources department to confirm your contact information. Please also contact your human resources department should you have any questions or concerns while on leave.

Vazquez spoke with Ciekko again during the quarantine period and informed him that he could not return to work until he got another negative COVID test. However, Vazquez contacted him again on November 23 and told him he did not need to get tested again and he returned to work on November 24.¹¹

On January 11, 2021, Ciekko called Vazquez and informed her that he had a low grade fever, cough and a sore throat after having been in close contact without a mask on with his brother-in-law on January 7, 2021, who then tested positive for COVID-19. He used sick time and then took an unpaid leave of absence to quarantine. He only had seven hours of sick leave at the time and, as a result, he was on unpaid leave through January 22, 2021.

(2) Meko Beach

On November 17, Beach, a facilities maintenance employee, informed Adamson from home that a member of his household tested positive for COVID-19. He told Beach to contact Vasquez. Beach contacted Vasquez, who told him to get tested for COVID-19. After asking Beach the CDC-recommended questions, Vasquez informed Beach that he could not return to work until he tested negative. She also helped him complete the requisite leave of absence form. Beach proceeded to get tested and the results came back negative. He emailed the results to Vasquez and called her to find out when he could return to work. Vasquez informed Beach that he needed to stay out of work for 14 days. She also told him that he needed to use his vacation and/or or sick leave, which he had accrued in October. Once he exhausted that leave, Vasquez required Beach to take an unpaid personal non-medical leave of absence in order to keep his job.

¹¹ The Respondent questions Ciekko's credibility because he complained to Green about having to take unpaid leave during while quarantining as required by the Respondent prior to the incident with the photographer. Ciekko's personnel actions and communications with Vasquez, however, are not disputed. Nor is the Respondent's implementation of the new unpaid leave policy. (GC Exh. 14; R. Exh. 15-16; Tr. 209-11, 215-216, 220-25, 227-30, 235.)

Vasquez then emailed Beech the completed COVID-19-related form. He went into the office and was instructed by Vasquez on which category of leave to select. Beach then quarantined, as instructed, and returned to work on November 30.¹²

5 (3) “TR”

“TR,” a food service employee, reported a potential COVID exposure on December 25 to Connor because Vazquez was out on vacation. She was tested on December 29 and called in her negative results to Connor on January 4, 2021. Vazquez then informed TR that she was required to quarantine for 14 days from the date of the exposure, until January 9, 2021.¹³

(4) CTS Specialist

Vazquez reported by email that unit employee’s husband tested positive and was advised by the public health department to have his family quarantine for ten days. Despite that public health recommendation, Vazquez instructed the employee to stay home and quarantine for the 14 day. Vazquez’ email also suggests that telework was an option, but that she had told her to hold off, adding “[w]e would still have to clear the telework with the Union. She ended by asking how they would like her to proceed.¹⁴

LEGAL ANALYSIS

I. THE ALLEGED CHANGES TO SICK LEAVE POLICIES

The complaint alleges the following unilateral changes: (1) the distribution of the July 8th Memorandum stating the terms and conditions for staff to return to work; and (2) the implementation of the July 8th Memorandum by directing unit employees not to work, without pay, even if they can show a negative COVID test, and have no symptoms of illness. The Respondent contends that (1) the alleged changes did not constitute a material change, (2) the Union waived its right to bargain over the changes, (3) the changes were required by the DOL and the Commonwealth of Massachusetts, and (4) the allegations are time-barred.

A. *The Union’s March 30, 2020 Waiver is Not Dispositive*

Because a majority of its employees were unit members from its predecessor, the Respondent was obligated to recognize and bargain with the Union. *NLRB v. Burns International Security Services*, 406 U.S. 272 (1972). As a *Burns* successor, however, the Respondent “was free to make one-time initial unilateral changes in the status quo terms and conditions of employment for bargaining unit employees that the predecessor, as an incumbent employer, would have been precluded from making. The successor can, in effect, reset the status quo at the commencement of a bargaining relationship. ‘Once a *Burns* successor has set initial terms and conditions of employment, however, a bargaining obligation attaches with respect to any

¹² Vazquez confirmed Beach’s version of the events. (Tr. 77-81, 175-82, 186-95, 200-01, 215-16, 220-25, 227-251; GC Exh. 14 at 5; GC Exh. 16 at 3; GC Exh. 26 at 1; R. Exh. 15-16, 96.).

¹³ R. Exh. 104.

¹⁴ GC Exh. 27.

subsequent changes to terms and conditions of employment,’ as required by *Katz. Tramont*, supra, slip op. at 4 (citing *Paragon Systems, Inc.*, 362 NLRB 1385, 1386 (2015)).

The Respondent initially set terms and conditions of employment, including those relating to personal, sick and vacation leave, in August 2018. On March 26, the Respondent notified the Union that it was unilaterally changing its leave policies in response to the pandemic. After the Union objected, the Respondent threatened to rescind the telework policy and provided the Union with changes to its leave policies (the March 22 FAQs). On March 30, the Union relented and specifically waived its objection to the telework policy and its effects (“bargain improvements”). The Union also waived, albeit implicitly, any objections it may have had to the changes to leave policies. This issue is not dispositive, however, since the allegations relate to the changes announced on July 9.

B. Respondent Exercised Discretion in its Implementation of the State COVID Guidelines

An employer is relieved from the obligation to bargain where a specific change in terms and conditions is mandated by law. *Murphy Oil USA*, 286 NLRB 1039, 1042 (1987) (work rule changes required by OSHA); *Standard Candy Company*, 147 NLRB 1070, 1073 (1964) (increases in wages required under the minimum wage provisions of the Fair Labor Standards Act); *Sun Electric Corporation*, 266 NLRB 37, 44 (1983) (perfunctory changes to pension plan required by the ADEA and implementing DOL and IRS regulations, where expired contract expressly provided that pension plan was to be conformed to state and federal laws). On the other hand, an employer is not relieved from its obligation to bargain over a change if it possesses discretion regarding the implementation of a statutory mandate. In such an instance, bargaining can still occur over the discretionary component of the mandate. See *Hanes Corp.*, 260 NLRB 557, 562-563 (1982) (employer unlawfully failed to consult with union concerning OSHA-mandated respirator program where the type of respirator to be selected remained discretionary); *Dickerson-Chapman, Inc.*, 313 NLRB 907 (1994) (failure to consult with union regarding the OSHA-mandated designation of “competent persons” was unlawful where the selection methodology remained discretionary).

The Respondent’s July 8th policy prohibiting employees from reporting to work if they have recently been exposed to COVID-19 represented an exercise of discretion. The policy, as it applied to essential workers, was not mandated by law; nor was the Respondent precluded from compensating any unit employees required to quarantine. Massachusetts and its DOL followed CDC guidance regarding a 14-day quarantine for individuals who were in close contact with someone who tested positive for COVID-19. As of May 7, however, the CDC was no longer recommending that essential workers, such as maintenance employees, self-quarantine after an exposure if they were not experiencing symptoms. Instead, the CDC recommended that such individuals wear appropriate protective equipment and self-monitor for symptoms.

C. The July 8th Memorandum was Not a Material Change From the Status Quo

An employer’s duty to bargain collectively under Section 8(a)(5) is prescribed in Section 8(d) as a duty to meet and confer in good faith regarding wages, hours, and other terms and conditions of employment. In *NLRB v. Katz*, the Supreme Court held that an employer’s refusal to negotiate, or “meet and confer,” upon request over Section 8(d)’s mandatory subjects

constitutes an unfair labor practice. 369 U.S. 736, 742-43 (1962). While negotiations for a new agreement are in progress, “an employer’s obligation to refrain from unilateral changes extends beyond the mere duty to give notice and an opportunity to bargain; it encompasses a duty to refrain from implementation at all, unless and until an overall impasse has been reached on bargaining for the agreement as a whole.” *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991) enfd. mem. 15 F.3d 1087 (9th Cir. 1994); *RBE Electronics of South Dakota, Inc.*, 320 NLRB 80, 81-82 (1995); *Wendt Corp.*, 369 NLRB No. 135, slip op. at 5-6 (2020). Moreover, it is well established that an employer has an obligation to give a union notice and an opportunity to bargain about the effects on union employees of a managerial decision even if the employer has no obligation to bargain about the decision itself. See *Tramont Manufacturing, LLC*, 369 NLRB No. 136, slip op. at 5 (2020)

The Respondent’s policies unilaterally rolled out on July 9, while the parties were in the midst of bargaining, were clearly distinct from those encompassed in its 2018 sick leave policy “[f]or business closures due to public health emergencies or absences occasioned by exposure to communicable disease.” That policy merely required employees to report absences for sick leave. It did not require them to take sick leave, much less be absent if they felt sick or were sick. The policy enabled employees who exhausted sick leave to use vacation time. If they ran out of vacation time, they could request an unpaid leave of absence. The July 8th Memorandum, on the other hand, *required* staff to sign an agreement stating, in pertinent part, that they “will not report to work if they are displaying any COVID-19 symptoms or recent exposure to someone who tests positive for COVID-19” and “follow OSHA, CDC, and local jurisdiction procedures while at the center.”

The July 8th Memorandum was distributed after Massachusetts’ updated guidance on May 7 designating certain employees, including unit employees who performed maintenance services, as essential. Those essential employees were no longer required to quarantine, but rather, self-monitor if they were exposed to a COVID-positive individual. The Respondent’s implementation of a practice reducing employees’ hours for up to 14 days under any of the newly stated circumstances would ordinarily constitute a mandatory subject of bargaining. Moreover, there were no economic exigencies requiring the Respondent to reduce employee hours, as the Westover JCC remained fully funded throughout 2020.

On the other hand, the requirement that all employees quarantine, without pay if they exhausted paid leave, was already unilaterally changed and accepted by the Union as the status quo in the March 22 FAQs on March 30. See *Raytheon Network Centric Systems*, 365 NLRB No. 161, slip op. at 16 (2017) (“employer’s past practice constitutes a term and condition of employment that permits the employer to take unilateral actions that do not materially vary in kind or degree from what has been customary in the past”). The fact that employees had to fill out a new type of leave form in order to take the type of unpaid leave already spelled out on March 22 was merely a change in form, not substance. See *Litton Systems*, 300 NLRB 324, 331-32 (1990) (replacement of clocks with a buzzer for employee breaks was not a material change); *Goren Printing Co.*, 280 NLRB 1120 (1986) (requirement that employees give supervisor written notice instead of oral notice if leaving work early was not a material change).

In conclusion, the Respondent’s distribution and implementation of the July 8th Memorandum by directing unit employees not to work if they had a close contact with a

COVID-positive individual, without pay, even if they tested negative for COVID-19, and had no symptoms of illness, did not constitute a material change from its past practice.

II. THE COMPLAINT IS TIME-BARRED

Section 10(b) of the Act is a statute of limitations. It generally extinguishes liability for unfair labor practices committed more than 6 month prior to the filing of the charge. The Section 10(b) period commences when a party has “clear and unequivocal notice of a violation.” *Leach Corp.*, 312 NLRB 990, 991–992 (1993), enfd. 54 F.3d 802 (D.C. Cir. 1995).

The genesis of the alleged unilateral changes relating to mandatory quarantines and unpaid leave announced on July 9, and implemented thereafter, is found in the March 22 FAQs. In those FAQs, the Respondent informed employees that they could not come to work if they had symptoms consistent with COVID-19 or were in close contact with someone who tested positive for the disease. The Respondent’s July 8th Memorandum merely reiterated the same policy – employees could not report to work if they came in close contact with someone who tested positive for COVID-19. Although that directive did not specifically mention the duration of a mandatory quarantine, its immediate implementation established that it continued to be 14 days for all employees, regardless of their essential status.

Under the circumstances, the Respondent satisfied its burden of showing that the Union had notice of an unfair labor practice violation on March 26, which is more than six months prior to the filing of the charge in this case on October 7, 2020. Accordingly, the allegations are time-barred. *Postal Service Marina Center*, 271 NLRB 397, 399 (1984) (focus is on the date of the alleged unlawful act, not the date its consequences become effective).

CONCLUSIONS OF LAW

1. The Respondent, Management & Training Corporation (the Respondent), is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Industrial Division of the Communications Workers of America, AFL-CIO (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent’s unilateral distribution and implementation of a memorandum to unit employees on July 9, 2020 entitled “MTC Staff Training for Return to Work Under Covid-19 Precautions” (a) did not materially change existing terms and conditions by directing unit employees not to work, without pay, even if they can show a negative COVID test, and have no symptoms of illness, and (b) was untimely filed and is time-barred.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁵

¹⁵ If no exceptions are filed as provided by Sec. 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The complaint is dismissed.

5 Dated, Washington, D.C. August 2, 2021



Michael A. Rosas
Administrative Law Judge

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